said he changed his mind in accepting the Lord President's explanation because of his meeting on the same day with the Chief Justice whom he alleged had requested him to put in a fuller case. We cannot accept the testimony that the impugned letter was sent at the behest of the Chief Justice for the simple reason that that letter is dated May 26, whereas the letter allegedly written in response to the Chief Justice's request was typed and delivered on May 24.

In the circumstances of this case we are satisfied beyond reasonable doubt that the advocate is guilty of contempt of court.

In assessing sentence, we agree that custodial sentence is not necessary in this particular case. On the other hand, we take into account the attitude of the advocate during the whole proceedings. As an officer of the court, he has not disclosed any sign of regret or remorse for what he has done and the damage he has inflicted on the dignity and integrity of the court. Although the application by the Attorney-General and the appellants is for an order of committal, having regard to all the factors and circumstances of this case, we impose a fine of $5,000.00 in default three months' imprisonment which in our view is fair and adequate. In imposing the sentence we also take into consideration that the commission of the offence is the first in point of time against the Supreme Court, and the publication of the contumelious letters is limited to the Judicial fraternity. We wished that the advocate had tendered his apology before the hearing of this application and that he would plead for leniency after he is found guilty, to enable us to consider them as additional mitigating factors.

We also order that the advocate should pay the costs of this application both to the Attorney-General and the appellants.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar; Arthur Lee & Co.*

NOVOTEL SOCIETE D' INVESTISSEMENTS ET D' EXPLOITATION HOTELIERS & ANOR. v. PERNAS HOTEL CHAIN (SELANGOR) BHD.

[S.C. (Salleh Abas L.P., Wan Suleiman & Mohamed Azmi S.C.JJ.) January 6 & May 7, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 82 of 1985]

Contract – Management fees – Claim for – Importance of pleading – Interest – Discretion of court – Civil Law Act, 1956, s.11.

Practice and Procedure – Pleading – Importance of – Interest – Discretion of court – Civil Law Act, 1956, s.11.

Practice and Procedure – Interest awarded by lower court – Interference by appellate court – Exercise of discretion – R.H.C. 1980, O.42 r. 12.

In this case the respondents, the owners of the former Jayapuri Hotel at Petaling Jaya, had appointed the appellants as their agent to carry out and execute all services or acts required in relation to the mangement of the hotel. The management agreement was subject to approval by the Malaysian Government. In the event the Government amended the incentive fee payable and this was treated as a refusal. The agreement therefore never came into effect and the claim of the appellants was for outstanding management fees payable for the interim period prior to the date of the Government's conditional approval. In their statement of claim the appellants claimed the sum of $300,000 and interest at the rate of 8% per annum on the decretal sum from the date of demand that is March 23, 1982 till the date of realisation. The appellants applied for summary judgment and the Senior Assistant Registrar allowed the application. On appeal the learned Judge found no arguable case on the issue of liability but he ordered that the issue on quantum of management fees be tried before the Senior Assistant Registrar. The Senior Assistant Registrar assessed the management fees payable at $495,193.85 cts. on the basis of the interim period of 6 months on 22 days but judgment was entered only in the sum of $300,000. The respondents appealed contending that the length of the interim period should only be 4 months and not 6 months and 22 days as found by the Senior Assistant Registrar. The appellants also cross-appealed. The following issues were raised before the learned Judge in the appeal:

(i) Whether the Senior Assistant Registrar was correct in concluding that the interim period was 6 months and 22 days pursuant to Article 6(1) (a) of the management agreement.

(ii) Whether the Senior Assistant Registrar was correct in fixing the rate of incentive fee at 9% instead of 12% of the gross operating profit pursuant to Article 6(1) (b) of the said agreement.

(iii) Whether the rate of 8% interest on the judgment sum should run from the date of demand (March 23, 1982) as prayed and allowed by the Senior Assistant Registrar's first order dated January 12, 1984.

The learned Judge allowed the respondents' appeal on

quantum. He held that the length of the interim period claimable was only 4 months and the rate of percentage on incentive fee was 9% and accordingly the assessment of the Senior Assistant Registrar was reduced to $167,266.26 cts. The date from which the interest of 8% on the judgment sum was payable, was also varied by the learned Judge from March 23, 1982 (date of demand) to January 12, 1984, the date of the Senior Assistant Registrar's first order. The appellants appealed.

Held: (1) on their pleadings as well as affidavit evidence in the Order 14 application, the appellants have claimed $300,000 from the respondents for outstanding management fees calculated on the basis of services rendered during four months of the interim period. To allow a judgment for more than four months period without amending the pleading would be contrary to principle. Similarly in their pleading and affidavit evidence the claim on incentive fee has been calculated at the rate of 9% in accordance with the Government approval and as such it is equally against the principle of pleading to allow them at the rate of 12% without amendment. There is no reason therefore to interfere with the learned Judge's finding on the first two issues, and the assessment of management fees of $167,266.26 cts. must be affirmed;

(2) an appellate court should be slow to interfere with the exercise of discretion in granting interest by a lower court unless the order made is wrong in law or principle such as where the amount of interest awarded is unreasonably high or unreasonably low. Since no valid reason has been advanced to merit interference with the Senior Assistant Registrar's discretion, the learned Judge's judgment on interest must be set aside and the order of the Senior Assistant Registrar restored.

Cases referred to:

(1) *Esso Petroleum Company Ltd.* v. *Southport Corporation* [1955] 3 All E.R. 864; [1956] 2 W.L.R. 81.

(2) *Hadmor Productions Ltd. & Ors.* v. *Hamilton & Ors.* [1982] 1 All E.R. 1042, 1046.

SUPREME COURT.

G. S. Nijar (*Azzat Kamaludin* with him) for the appellants.

S. E. Rajan (*Kevin G. Danker* with him) for the respondents.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court) : The dispute in this appeal involves the quantum of management fees payable to the plaintiffs ("NOVOTEL" for short) by the owners of the former Jayapuri Hotel at Petaling Jaya. By a written agreement dated April 1, 1981, the defendants originally known as Hotel Jayapuri Bhd. appointed NOVOTEL as their sole and exclusive agent with full authority to carry out and to execute all the services or acts required in relation to the management of the defendants' hotel. The management agreement was however a conditional one; its effective date being conditional upon the approval of the agreement by the Malaysian Government. Approval was given about 7 months later by the Ministry of Trade and Industry *vide* their letter dated October 22, 1981. All the terms of the contract including its duration and the various fees chargeable were approved except as regards incentive fee payable under Article 6(1) (b) which had to be amended from the rate of 12% to 9% of the annual gross operating profit. It would appear that because the requisite amendment by the government was treated as a 'refusal', the agreement never came into effect and NOVOTEL's claim is for outstanding management fees payable for the interim period prior to the date of government approval pursuant to Article 6(1) read with the proviso to Article 3(1) of the agreement. It is convenient at this early stage to set out the relevant parts of the two articles under consideration. Article 3(1) provides:

"This agreement is conditional upon the prior written approvals of all the relevant governmental authorities being obtained by the Owner and immediately upon execution of this Agreement the Owner shall at its own cost and expense apply to such governmental authorities for the necessary approvals for appointing NOVOTEL its sole and exclusive agent in accordance with Article 2 hereof and the Owner shall notify NOVOTEL immediately upon obtaining such approvals. The parties hereby agree (that) this Agreement becomes effective on the date when all the approvals by such governmental authorities shall have been obtained (hereinafter referred to as the 'effective date'). Provided that as regards the operation of Article 6 it shall be deemed to have effect on the date of this Agreement."

Omitting the full text on agreed time for payment, which during the interim period is 7 days from the date of government approval or refusal, Article 6(1) provides:

"In consideration for the rights hereby granted and its services NOVOTEL will receive the following annual fees from the Owner:-

(a) A basic fee of one percent (1%) of the Hotel's annual turnover. For the first twenty four (24) calendar months of the operation of this agreement (including the interim period prior to all approvals from the relevant governmental authorities having been obtained) NOVOTEL shall be entitled to an additional fee of Ringgit One Hundred Thousand (M$100,000.00) per annum as part of the basic fee. ...

(b) An incentive fee of twelve percent (12%) of the Annual Gross Operating Profit. Payment on account of this fee will be made quarterly to NOVOTEL in respect of three (3) calendar monthly periods calculated from the effective date such payments to be made within forty-five days following the end of each such quarter, on

the basis of the results accounts submitted to the owner. ..."

By paragraph 5 of their statement of claim dated August 4, 1982, NOVOTEL allege that they "have executed and performed their services in accordance with the said agreement which services and management fees outstanding amount to $300,000, full particulars of which have been rendered to the defendants". Paragraphs 6 and 7 then allege that they have also demanded for the said sum but the defendants have neglected to pay the same or any part thereof. Wherefore NOVOTEL pray for (a) judgment in the sum of $300,000, (b) interest at the rate of 8% per annum on decretal sum from the date of demand i.e. March 23, 1982 till the date of realisation, (c) costs, and (d) further and other relief as the court may deem fit. On January 12, 1984 NOVOTEL's application for summary judgment under Order 14, RHC for the sum of $300,000 was allowed by the Senior Assistant Registrar with interest at 8% per annum from date of demand (March 23, 1982) till date of realisation and costs. On appeal by the defendants, Abdul Razak J. found no arguable case on the issue of liability and thereby upheld the Senior Assistant Registrar's decision on that score. The learned judge held that NOVOTEL were entitled to management fees pursuant to Article 6(1) for the interim period prior to government approval to which the management agreement was conditional. But the learned judge set aside the judgment sum of $300,000 and ordered the issue on quantum to be tried before the Senior Assistant Registrar. There was no appeal against the order on liability and the case was sent back to the Senior Assistant Registrar for trial on quantum. Consequently, the Senior Assistant Registrar assessed the management fees payable at $495,193.85 cts. on the basis of interim period of 6 months and 22 days, but judgment was entered for NOVOTEL only in the sum of $300,000 on the ground presumably that NOVOTEL were bound by their pleading and that that sum was the maximum amount to which NOVOTEL could be awarded having regard to their statement of claim and the affidavit in support of their Order 14 application. The defendants again appealed against the judgment of $300,000 contending that the length of the interim period should only be 4 months and not 6 months and 22 days as found by the Senior Assistant Registrar. NOVOTEL also cross-appealed on the ground of inadequacy holding that the whole quantum of assessment should have been decreed. We must express our view at the outset that the cross-appeal for the full amount clearly had no merit, for whatever might be the amount payable to NOVOTEL under the agreement, it should be obvious that on the pleading and the affidavit in support of their Order 14 application, NOVOTEL had elected to limit their claim to $300,000. We are of the view that what was in excess of that amount must be deemed to have been abandoned. During the second appeal three issues were raised before the learned judge *viz:*

(i) Whether the Senior Assistant Registrar was correct in concluding that the interim period was 6 months and 22 days pursuant to Article 6(1) (a) of the management agreement.

(ii) Whether the Senior Assistant Registrar was correct in fixing the rate of incentive fee at 9% instead of 12% of the gross operating profit pursuant to Article 6(1) (b) of the said agreement.

(iii) Whether the rate of 8% interest on the judgment sum should run from the date of demand (March 23, 1982) as prayed and allowed by the Senior Assistant Registrar's first order dated January 12, 1984.

Before the learned judge, in assessing the quantum, the area of conflict was greatly narrowed as a result of agreement by both parties to accept the defendants' computation of full management fees based on audited accounts for year ended December 31, 1981 as the basis of assessment. On the basis of this document, if the duration of interim period is 4 months (June 1 to September 30, 1981) then the outstanding sum due to NOVOTEL is $167,266.26 cts. at 9% rate of incentive fee, or $198,060.36 cts. at 12% rate. On the other hand if the length of interim period is 6 months and 22 days (April 1 to October 22, 1981) then the amount due is $281,832.21 cts. at 9% rate of incentive fee or $333,718.16 cts. at 12% rate. In the event the learned judge allowed the defendants' appeal on quantum and held that the length of the interim period claimable was only 4 months and the rate of percentage on incentive fee was 9%, and accordingly the assessment of the Senior Assistant Registrar was reduced from $495,193.85 cents. to $167,266.26 cts. The date from which the interest of 8% on the judgment sum was payable, was also varied by the learned judge from March 23, 1982 (date of demand) to January 12, 1984 (date of Senior Assistant Registrar's first order) although NOVOTEL's present contention before us notwithstanding their prayer in the pleading, is that the proper date should be October 30, 1981 (date of actual approval by the government). NOVOTEL now appeal to us on the assessment of the learned

judge, and the same three issues canvassed before Abdul Razak J. are being contested before us. However, Mr. Nijar for NOVOTEL, appears to concede finally that although the amount due is $333,718.16 cts. his client is only entitled on the pleading, to a judgment of $300,000.

We now deal with the first two issues which are firstly, whether NOVOTEL are entitled to the whole interim period or only partially and secondly, whether the rate of percentage of incentive fee should be 12% or 9%. Although liability is not an issue before us, we must state that there can be no doubt from the terms of the proviso to Article 3(1) that irrespective of whether or not the agreement was approved by the government, the defendants are liable to NOVOTEL for services rendered during the interim period commencing from April 1, 1981 (date of agreement) to date of government approval or refusal, in accordance with Article 6(1) of the agreement. Since it is common ground that government approval was obtained on October 22, 1981, we agree with the contention of Mr. Nijar that the interim period must be between April 1, 1981 and October 22, 1981. But in accordance with the agreement what is payable to NOVOTEL must necessarily depend on the monthly services actually rendered by NOVOTEL during that period. Under Article 7(3) of the agreement it is the obligation of NOVOTEL to furnish the defendants within specified periods (a) monthly turnover statement, (b) a monthly operating account and (c) a yearly balance sheet, operating account, and profit and loss account, and it is these accounts according to Article 7(4) which "will serve as the basis for calculation of the management fees referred to in Article 6(1)". We note as indeed was noted by the learned judge, that before filing their writ of summons, NOVOTEL through their solicitors had by letter dated July 26, 1982 *i.e.* about nine months after government approval was obtained, supplied to the defendants copies of the accounts in respect of the $300,000 claim, although the accounts show a total fee of $462,232.96 cts. for the period of April to November 1981. The total fee was arrived at by NOVOTEL on the basis of 1% of the hotel's annual turnover plus incentive fee as provided under Article 6(1) (a), and 9% of annual gross operating profit as incentive fee under Article 6(1) (b) as approved by the government instead of the original 12%. From these accounts supplied by NOVOTEL, we are in agreement with the learned judge that NOVOTEL have indeed elected not to claim for the whole duration of the interim period but only partially to the extent of $300,000. The duration of the interim period on which NOVOTEL's claim of $300,000 is based, is made crystal clear by the affidavit of their solicitor, Mr. Cyril Oliver Xavier in support of the Order 14 application and affirmed on March 28, 1983 *i.e.* nearly 1½ years after government approval was obtained. By paragraph 6 of his affidavit Mr. Xavier annexed exhibit "COX 4" which is NOVOTEL's own computation of the 1981 management fees. The duration of their claim is undeniably for a period of 4 months only. Although the figures claimed in exhibit "COX 4" might be in dispute, the formula of their claim as contained in the document was never rejected by the learned judge during the first appeal. Therefore, it is not correct for Mr. Nijar to argue that during that appeal the learned judge had rejected exhibit "COX 4" altogether. The order of the learned judge dated May 9, 1984 states:

> "That the parties shall go for trial on an early date on the determination of the amount of the said management fees before the Senior Assistant Registrar."

By that order the learned trial judge merely concluded that there was a triable issue on the quantum without rejecting or accepting anything. Thus, at the most it was the figures or quantum claimed in exhibit "COX 4" which were questionable but not the basic formula by which the figures were arrived at as pleaded by NOVOTEL. In our view, there is no justification in holding that the learned judge had during the first appeal rejected NOVOTEL's claim of 4 months period, or 1% of the hotel's annual turnover plus $100,000 per annum as basic fee, or 9% of the annual gross operating profit as incentive fee. As stated by the learned judge in his judgment, the figures of incentive fee in column 3 of exhibit "COX 4" confirmed the rate of 9% claimed by them in the accounts rendered to the defendants before the present suit was filed and referred to in paragraph 5 of their statement of claim. On these two documents we are satisfied that NOVOTEL's claims are limited to the months of June to September 1981. Further, although the monthly sum of $8,333.33 cts. claimed by NOVOTEL as incentive fee in the third column of their accounts supplied to the defendants (which also appears in exhibit "COX 4") might be an erroneous figure, there could be no doubt that the claim was arrived at by NOVOTEL on the basis of 9% of the said profit. NOVOTEL are bound by their pleading, affidavit evidence and as well as by their own financial accounts rendered to the defendants under the agreement. The importance of pleading is already well established and if authorities are required we need only refer to *Esso Petroleum Company Ltd.* v. *Southport Corpora-*

tion[1]. Moreover, by virtue of Article 6(1) (b) of the agreement under which the incentive fee is payable by the defendants, the payment must be made "on the basis of the results accounts" submitted to the defendants. The only evidence of "results accounts" before the court below are the accounts for April to November 1981 supplied by NOVOTEL to the defendants before the writ was filed which was annexed to their letter dated July 26, 1981. But as stated earlier, NOVOTEL have elected to limit their claim, which they are lawfully entitled to do, to four months from June to September, 1981. On their pleading and as well as affidavit evidence on the Order 14 application, we find NOVOTEL have claimed $300,000 from the defendants for outstanding management fees calculated on a basis of services rendered during four months of the interim period. To allow a judgment for more than four months period without amending the pleading would be contrary, to principle. Similarly, on their pleading and affidavit evidence the claim on incentive fee under Article 6(1)(b) has been calculated at the rate of 9% in accordance with government approval, and as such it is equally against the principle of pleading to allow them the rate of 12% without amendment. We therefore see no reason to interfere with the learned judge's finding on the first two issues, and we affirm the assessment of management fee of $167,266.26 cts. on the basis of the agreed document at page 146 of the Appeal Record.

We now turn to the third issue relating to when the 8% interest on the judgment sum should run. NOVOTEL are claiming from October 30, 1981 – the date of the Ministry's chop on the approval letter dated October 22, 1981. The Senior Assistant Registrar on both occasions, had ordered interest to run from March 23, 1982 – the date of demand by NOVOTEL as pleaded in the statement of claim. The learned judge did not deal with the matter during the first appeal, but during the second appeal he shortened it to January 12, 1984 *i.e.* the date of Senior Assistant Registrar's first judgment under Order 14. No reason is given by the learned judge for his interference in the Senior Assistant Registrar's exercise of discretion under section 11 Civil Law Act 1956. Under that provision the court is entitled to order interest for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. In addition the court also has power under Order 42 rule 12 of the Rules of the High Court 1980 to order interest at 8% per annum or at such other rate not exceeding that rate, calculated from the date of the judgment until the judgment is satisfied. In our view, an appellate court should be slow to interfere with the exercise of discretion in granting interest by a lower court unless the order made is wrong in law or principle such as where the amount of interest awarded is unreasonably high or unreasonably low. [*See Hadmor Productions Ltd. & Ors.* v. *Hamilton & Ors.*][2]. Since no valid reason has been advanced to merit interference with the Senior Assistant Registrar's discretion, and having regard to NOVOTEL's entitlement to payment within 7 days of government approval in October 1981 in accordance with mode of payment provided in Article 6(1), we would set aside the learned judge's judgment on interest and restore the Senior Assistant Registrar's order, which means that the defendants should pay interest on the judgment sum of $167,266.66 cts. at the rate of 8% per annum from March 23, 1982 to date of realisation.

As regards costs we find no reason to interfere with the order made by the learned judge.

Except for the order on interest, we dismiss the appeal. Be that as it may, having regard to all the circumstances of this case, we are of the opinion that the parties to this appeal should bear their own costs. We also order that the deposit be refunded to NOVOTEL.

Order accordingly.

Solicitors: *Chua Brothers, Azzat & Xavier; Zain & Co.*

RAJINDER KAUR v. JESWANT SINGH

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) February 6 & August 2, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 420 of 1985]

Land Law – Caveat – Caveatable interest – No serious question to be tried – Balance of convenience – Status quo – National Land Code, ss. 327 & 323.

The respondent and the appellant in this case were brother and sister and were directors and shareholders of a family company with two other brothers as directors. The company functioned as a real estate agent. Their father had rendered financial assistance to the company in the form of loan advances.

The appellant decided to purchase a land and house for the sum of $95,000. A sum of $28,500 was advanced by